IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
First Appeal No.2426 of 2005
with
Civil Appln No.5957 of 2005

Mr Abdul Hasan Shaikh Mansuri . appellant
vs
Mun Corpn of Mumbai and ors .. respondents

Mr Anil R Mishra for appellant
Mr J Xavier for BMC

CORAM; A.M.KHANWILKAR J.

DATED 2.3.2006

P.C.

l. Heard learned counsel for the parties. Admit. Mr Xavier waives notice for Mun Corporation. As short question is involved, the appeal is taken up for hearing forthwith by consent.

2. This appeal emanates from the judgment and decree passed by the City Civil Court Mumbai dated 22.9.2005 in L.C Suit No. 532 of 2004. The appellant instituted the suit before the lower court for declaration and injunction against the defendants to forebear from demolishing the suit premises admeasuring 5 ft x 4 ft constructed of GI sheet wall and AC sheet roof bearing S.No.44, Hissa No.9B, CTS No. 737(pt) of village Kandivli, Taluka Borivli, Mumbai, situated at Gandhi Nagar Near

Power House, Durga Mandir Road, Kandivli West, Mumbai. The substantive relief claimed by the appellant plaintiff read thus:

> "a) That this Hon'ble court be pleased to declare that the threat given by the defendants to demolish the suit premises admeasuring 5' x 4' sq ft constructed of GI sheet wall and AC sheet roof bearing S.No.44, Hissa No.9B CTS no.737 (pt) of Village Kandivli, Taluka Borivli Mumbai Suburban District situated at Gandhi Nagar Near Power House, Durga Mandir Road, Kandivli(West) Mumbai 400067 as more particularly shown in Exhibit A annexed hereto without following due process of law is illegal and unlawful.
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> b) That the defendants their agents, servants, officers, employees be permanently restrained by an order and injunctions of this Hon'ble court from demolishing the suit premises/ admeasuring 5' x 4' sq ft constructed of GI sheet wall and AC sheet roof bearing S.No.44, Hissa No.9B CST no.737 (pt) of Village Kandivli, Taluka Borivli Mumbai Suburban District situated at Gandhi Nagar Near Power House, Durga Mandir Road, Kandivli(West) Mumbai 400067 without following due process of law
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> c) that interim and ad-interim reliefs in terms of prayer (b) above be granted.
>
> d) costs of this suit be provided for
>
> e) for such other and further reliefs as the nature and circumstances of the case may require be granted".

3. Essentially, the relief claimed in the suit was to issue direction to the corporation to proceed against the suit structure after following the due process of law. The case of the plaintiff was that the suit structure was constructed by one Khan

Sabuddin Nazirkhan from whom the appellant had purchased it under an agreement of sale dated 3.l2.l99l. Indeed, the agreement of sale is not a registered document as has been noted by the trial court. Nevertheless, such document can be used in evidence for collateral purpose such as to buttress the relief claimed. To establish the fact that the suit structure is existing since long, the appellant relied upon the order passed by the Tahasildar dated 2/2/l996 which mentions that the plaintiff was allegedly using the land for unauthorized non agricultural purpose. The appellant also relied upon the agricultural tax receipt dated 2.5.l996 and the licence granted by the corporation under the Shops and Establishments Act. It is not necessary to refer to other circumstances pressed into service by the appellant to assert that the suit structure is existing since long.

4. In my opinion, these documents and the evidence produced by the appellant was sufficient to infer that some structure did exist on the disputed land on the date of the institution of the suit. Such a finding was inevitable as the respondent-defendants did not file any written statement. If this is the finding to be reached, the court below has

committed manifest error in dismissing the suit which was essentially for direction against the Authorities to take action against such a suit structure by following due process of law.

5. The trial court however,adopted specious reasoning that the agreement of sale relied by the appellant was not a registered document. This opinion overlooks that even such document can be relied in evidence for collateral purpose, though not for establishing title. The trial court has then observed that the order of Tahasildar and the agricultural tax receipt cannot show legality of the structure. This opinion overlooks that the scope of receipt in the suit was very limited, namely, the Authorities should proceed against the suit structure by following the due process of law.It is too late in the day even for a private individual leave alone Statutory Authorities - such as the respondents to contend that it is open to dispossess any one from the property who is in settled possession thereof without following due process of law. It will be useful to refer t the case of Krishna Ram Mahale vs Shobha Venkat Rao reported in l989(4)SCC l3l. In para 8 of the reported decision it is observed that it is a well settled law in this country that where a person is

in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse to law. We may also refer to the case of Anamallai Club vs Government of T N and ors, reported in (l997) 3 SCC l69. It is held that a person in juridical possession cannot be dispossessed unilaterally without recourse to law, as law respects possession even if there is no valid title to support it. There is also authority on the point that even an encroacher is justified in making grievance that he should be heard before being dispossessed - See Kanniappan and ors vs. A Perumal and ors, reported in (2002) l0 SCC 98. Viewed thus, the fact that the suit structure is not legal or authorised cannot be the basis to throw out a suit simplicitor for a direction to the Authority to take action in regard to the structure by following due process of law. Assuming that without any written statement on record the respondent no.l could cross examine the plaintiff witness; and on which evidence the trial court has noted that the plaintiff has admitted that he has no documentary evidence to show that the suit structure was constructed by taking permission of the Corporation. Such inquiry and finding is travelling beyond the limited scope

of the suit for direction against the Authorities to refrain from taking any action in respect of the suit structure except by following due process of law. The trial court has then found that the appellant has not produced any assessment receipt to indicate that the suit structure was assessed and numbered in the municipal record. It is further observed by the trial court that the appellant failed to indicate the name of the officer who gave threats to the appellant on 24.l.2004 that he would take action in respect of the suit structure,which compelled the appellant to institute the suit on the basis of such apprehension without even complying with the formality of issuance of statutory notice under section 527 of the MCC Act. Suffice it to observe that, such approach to say the least, is impertinent to the point in issue.

6. The limited controversy that was required to be answered by the trial court for the nature of the dispute is whether the suit structure existed on the site as claimed by the plaintiff and if so, the Authorities would be obliged to take action against such structure only by following the due process of law, which was the limited direction sought by the appellant. In other words, the decision of the

trial court impugned in this appeal cannot be sustained either on facts or in law. Same is therefore set aside and instead the suit is decreed with direction to the respondents to doth take any action in relation to the suit structure after following due process of law. It is made clear that the observations in this judgment is not an expression of opinion on the factum of the suit structure is authorised or protected or otherwise. That inquiry will be undertaken in the proceedings to be initiated by the respondents in accordance with law before taking any action in respect of the suit structure. All questions relevant in such proceedings are kept open to be decided on its own merit.

7. Appeal as well as civil application is disposed of on the above terms with no order as to costs.

8. While parting with this judgment I may observe that in proceedings such as the present one, where the plaintiff approaches the court for a limited relief that the authority be directed to follow due process of law,there is very little or no defence available to the authority. It would be a different matter if the authority was to assert that the subject matter of the suit (suit premises)

were not in existence at all on the date of institution of the suit or that the due process of law has already been followed in respect of the suit structure in the suit, in which case the question of granting relief in such suit would not arise. However, in any other situation where existence of some structure is not disputed or indisputable, relief such as prayed in the present suit, will have to be granted for asking, as no authority can be permitted to take unilateral action, even if the structure is unauthorized - except by following due process of law. Therefore all the Corporations and the Municipal Authorities may be well advised to consider issuance of appropriate directions to all its officers concerned with the subject that in a suit of this kind a statement be made on the first date of hearing of the suit before the court on behalf of the authority that they will follow the due process of law on which basis the suit can be disposed of. That will assuage the apprehension of the plaintiff in relation to the suit property. Besides, that would not only result in conserving avoidable court time but also public exchequer in requiring to undergo the rigmarole of a full fledged trial.

9. There will be one other practical advantage of

such a course. Even if the general scenerio is that the officers of the Municipal Authorities are sincere and known to be honest; but there is always a possibility of some abrasion down the line. The unscrupulous litigant on being pre-warned of the proposed or contemplated action regarding the structure by an obliging officer, may rush to the court of law with a suit for injunction that no action be taken against the structure without following due process of law. In such a suit ad-interim order were to be granted by the court. Judicial notice can be taken of the fact that the suit and later on appeal would remain pending for some time. All this time lost will inevitably enure to the benefit of the plaintiff as the legal action regarding the structure will be deferred on the specious plea that the matter is subjudice. Instead, such a suit can be disposed of on the first date of hearing on the statement to be made on behalf of the Authority that the due process of law will be followed. Soon thereafter the legal process against the structure can be proceed with and taken to its logical end. In the process,there will be no opportunity to the unscrupulous litigant to gain undue time by using the process of law. To wit, in the present case the suit was filed in January 2004. It is only

hereafter on expiry of over two years, the action against the structure may be initiated by the Authorities and proceeded in accordance with law.

l0. Indeed, it is possible that in a given case, taking advantage of such statement to be made by the Authority the unscrupulous plaintiff may carry on some unauthorised construction or extend the existing structure. To obviate such a situation, the plaintiff shall be obliged to produce on record, on affidavit, the latest photographs showing all the dimensions of the suit structure and the plans thereof to be certified by a licenced Architect , so that the onus will rest on the plaintiff if any additional construction is noticed later on during the action before the Authority or the court of law and such plaintiff can be denied the equitable relief as also proceeded against for appropriate action, civil and criminal.

ll. The Registrar of the High Court is directed to send copy of this order to all the Municipal Commissioners of the Municipal Corporations and Chief Executive Officers of the Municipal Councils in Maharashtra for information and necessary action.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY Appellate Side

First Appeal No. 2426 of 2005

Date of Judgment: 2nd March 2006

For approval and signature of:

The Hon'ble Mr.A.M.KHANWILKAR J.

1. Whether the Reporters of the local papers may be allowed to see the judgment/order?

2. Whether to be referred to the Reporters or not?

3. Whether Their Lordships wish to see the fair copy of the judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Aurangabad and Goa offices?